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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALAN W. GILL, a single man, Plaintiff/Appellant, v. SIERRA FARMING PARTNERSHIP, an Arizona general partnership; DON A. ENGLAND and STACEY K. ENGLAND, husband and wife; ALEXANDER WHITE and ESTHER WHITE, husband and wife; JIM WHITE, SR. and JESSIE WHITE, husband and wife; JAMES BAKER WHITE, a single man; JOHN WHITE and AGNES WHITE, husband and wife; HENRY WOODS and CHRISTINA WOODS, husband and wife; HENRY WOODS and MARIE WOODS, husband and wife; JOHN STEWART and GLORIA ANN STEWART, husband and wife; THOMAS WATSON, SR. and JESSIE WATSON, husband and wife; THOMAS WATSON, JR. and ELIZABETH WATSON, husband and wife; JOSEPH WATSON, a single man; JAMES STEWART and BELLAMARIA STEWART, husband and wife; WILLIAM WOODS, a single man; ALEXANDER WOODS, a single man; CHARLES STEWART, a single man; MARY STEWART, an unmarried woman; and ALEXANDER STEWART, a single man, Defendants/Appellees.	2 CA-CV 2007-0115 2 CA-CV 2008-0006 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200501114

Honorable William J. O'Neil, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Alan Gill appeals a grant of summary judgment in favor of appellees Sierra Farming Partnership, Don England, and Stacey England[1] ("Lessees"), and a separate grant of summary judgment in favor of a group of Pinal County landowners from whom Sierra Farming leased agricultural land ("Landowners"). Both motions were granted based on the trial court's conclusion that neither Lessees nor Landowners owed a duty of care to Gill and, therefore, Gill could not maintain his negligence action. On appeal, Gill challenges the

[1]Although Gill sued Don and Stacey England as husband and wife, one of his arguments on appeal is based on the fact that the Englands divorced in 2002, before the accident occurred. Stacey England retained no interest in the partnership that leases the land; consequently, her relationship to this case is unclear.

affidavit in support of Lessees' motion for summary judgment and contends the trial court erred in finding no duty owed to Gill because he had been trespassing.

Factual and Procedural Background

¶2 In reviewing a grant of summary judgment, we view the evidence and all reasonable inferences from it in the light most favorable to the nonmoving party. *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A.*, 198 Ariz. 173, ¶ 2, 7 P.3d 979, 980 (App. 2000). In August 2003, "around noon," Gill was driving in rural Pinal County, trying "to see some more desert [he] hadn't seen yet," and became lost. Attempting "to go to Florence as the crow flies," he assumed "there [were] probably other roads" not on his map and continued to follow numerous dirt roads that ended in "T" intersections. Gill was eventually driving "about 45" miles per hour on one of these roads when he suddenly "realized there was an irrigation ditch in front of [him]."[2] Gill was unable to stop, his car fell into the canal, and he sustained serious injuries. The dirt road leading to the canal was located on property owned by Landowners and leased by Lessees; the canal and its right-of-way were under the jurisdiction of the local irrigation district. Gill filed a negligence action against Lessees and Landowners. Lessees moved for summary judgment, claiming their only duty to a trespasser was to avoid intentionally or wantonly causing harm. After the court granted Lessees' motion, Landowners moved to dismiss Gill's claims against them on the same basis. Because Landowners relied on the ruling in favor of Lessees, the trial court treated their

[2]The record shows this was the Florence-Casa Grande Extension Canal.

motion as one for summary judgment and granted relief. Gill then filed these appeals, which we have consolidated.

¶3 On appeal from a grant of summary judgment, we determine *de novo* whether the record reflects any genuine issue of material fact and whether the moving party was entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(c)(1); *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, ¶ 11, 993 P.2d 1078, 1081 (App. 1999). Summary judgment is properly granted when the nonmoving party fails to present evidence that would permit reasonable persons to agree with the conclusion advanced. *Gittings v. Am. Family Ins. Co.*, 181 Ariz. 176, 178, 888 P.2d 1363, 1365 (App. 1994).

The Lessees

¶4 The trial court found Gill had not shown Lessees owed any duty to him as a trespasser and thus had shown no basis for his negligence claim against them. "Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 11, 150 P.3d 228, 230 (2007). The existence of a duty is a matter of law that is determined by the court. *Id.* ¶ 9; *Markowitz v. Ariz. Parks. Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985). If a duty exists, it "requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz*, 146 Ariz. at 354, 706 P.2d at 366.

¶5 Lessees argue, and Gill concedes, the only duty owed to a trespasser on land is "to neither willfully nor intentionally inflict injury." *Carlson v. Tucson Racquet and Swim*

Club, Inc., 127 Ariz. 247, 249, 619 P.2d 756, 758 (App. 1980); *see also Webster v. Culbertson*, 158 Ariz. 159, 161, 761 P.2d 1063, 1065 (1988). The Restatement (Second) of Torts § 329 (1965) defines a trespasser as one "who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Gill does not claim he was privileged to enter the Lessees's land nor that the Lessees behaved willfully or intentionally; instead, he relies on the Restatement to argue he falls within exceptions to the general rule regarding trespassers that would grant him invitee status and impose a different duty upon the Lessees and the Landowners. Gill may only avoid summary judgment if he can show one of the exceptions would apply here.

¶6 Gill first contends Restatement § 367 applies in his situation to convert his status from a trespasser to an invitee.[3] Interpreting this section of the Restatement, our supreme court has stated:

> We find the law to be that if an owner or occupant of property *has permitted persons generally to use or establish a way across it* under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon the premises by invitation.

Olsen v. Macy, 86 Ariz. 72, 73-74, 340 P.2d 985, 986-87 (1959) (emphasis added).

¶7 Gill cites *Olsen* and one other case, but each is readily distinguishable from the situation at hand because the route involved in those cases was the shortest way between

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[3]Restatement § 367 provides: "A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel."

heavily used public places. In *Olsen*, the route was a sidewalk adjacent to a public street and a row of shops. The court held:

> There was nothing whatever as disclosed in the record to give notice to plaintiff or anyone else similarly situated . . . that the sidewalks were not a part of Dunlap Street or that any portion of them were on the property of the defendants and not open to use by the public.

86 Ariz. at 74, 340 P.2d at 987. Gill also relies on *Harris v. Buckeye Irrig. Co.*, 118 Ariz. 498, 499, 578 P.2d 177, 178 (1978), in which our supreme court held an irrigation company responsible for the death of a child who fell off a bridge across a canal. Based on the existence of a sizeable residential area on one side of the canal; a high school, Little League baseball field, and public swimming pool on the other; the death of another child who had fallen from the same bridge four months previously; and the company's failure to attempt to prevent use of the bridge, the court found "[t]he bridge was, in fact, open to the public generally and the defendants did nothing either to restrict the use of the bridge by the public or to make it safe for the persons they knew were using the bridge." *Harris*, 118 Ariz. at 501-02, 578 P.2d at 180-81.

¶8 In this case, unlike *Olsen* and *Harris*, Gill fell into the canal while driving on what was essentially a dirt road to nowhere, not a thoroughfare that could reasonably be expected to be in general use. No trier of fact could reasonably conclude based on Gill's evidence that Lessees had permitted open use by the public of the road in question.

¶9 Gill relies heavily on the alleged absence of "no trespassing" signs near the road at the time of his accident. The presence or absence of signage, however, is not relevant

to the *Olsen* test. Instead, the pertinent question is whether the owner or occupier of the land knew of and permitted use by the general public. *See Olsen*, 86 Ariz. at 74, 340 P.2d at 986-87. Gill produced no evidence to show that Lessees were aware of or had permitted public use of the road in question. To the contrary, Don England's affidavit in support of Lessees' motion stated that "no trespassing" signs were posted and replaced as necessary.[4] The affidavit also showed that the public was not permitted any access to the property and that Lessees had no knowledge of prior trespasses. Finally, England stated the Lessees would have refused Gill permission to enter the property had he asked.

¶10 A neighboring landowner testified "signs are missing quite often" in the area. He also stated the county roads were graded and maintained on a regular basis, but the road in question had not been graded in the fourteen years he had lived in the area. And, in light of Gill's statements that he had been "lost," taking a "scenic route," and actively looking for roads not included on the map, which he "figured . . . probably [existed]" and that he had been forced to "zigzag" back and forth as the dirt roads he found repeatedly ended, his argument that he "reasonably regard[ed the] private road as an extension of the public road" strains credulity. Because Gill did not fit within the exception created by Restatement § 367, the trial court correctly concluded as a matter of law that he was a trespasser and Lessees owed him no other duty. *See Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230.

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[4]Gill attempts to challenge the sufficiency of this affidavit, primarily by alleging Sierra Farming Partnership is a "partnership of one" as a result of the Englands' divorce. Even if this assertion were accurate, the "one" would be Don England. Gill also sued England as an individual, and the affidavit in question is his.

¶11 Gill also attempts to invoke Restatement § 335 to impose a duty on Lessees. That section requires "[a] possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land" to warn those trespassers of dangerous artificial conditions upon the land that "the possessor has created or maintains" and are "of such a nature that he has reason to believe that such trespassers will not discover [them]." As noted above, Gill has provided no evidence Lessees knew of constant trespasses on this road, and Don England's affidavit affirmatively states they did not know. Moreover, although Gill describes the canal as "like . . . a Coyote-Roadrunner movie—a booby trap," the photograph in the record appears to show a large canal, testimony established the canal was wide enough to contain Gill's entire automobile, and Gill alleges there was a drop of twenty feet. Finally, England's affidavit and the lease for the premises show the boundary of the leased property is the right-of-way for the canal. Thus, the canal is not part of the land possessed by Lessees nor was it a condition created or maintained by them upon their land. Therefore, to the extent Gill characterizes the canal as the dangerous artificial condition, Restatement § 335 has no application here. *See* Restatement § 335 cmt. a.

¶12 Viewed in the light most favorable to Gill, the evidence produced does not raise any question of material fact relating to Gill's status nor bring him within either of the exceptions outlined in the Restatement. Therefore, the trial court properly concluded as a matter of law that Gill was a trespasser to whom Lessees owed no additional duty. *See Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230. As noted above, because Gill has not alleged

that Lessees acted intentionally or wantonly, he has not alleged a breach of the only duty owed to him as a trespasser. *See Carlson*, 127 Ariz. at 249, 619 P.2d at 758. Without the existence of some further duty, Gill had no valid claim of negligence. *Markowitz*, 146 Ariz. at 354, 706 P.2d at 366. Therefore, the trial court correctly granted summary judgment in favor of Lessees. *Gittings*, 181 Ariz. at 178, 888 P.2d at 1365.

The Landowners

¶13 Gill also challenges the trial court's entry of summary judgment in favor of Landowners. Because the Landowners' motion incorporated the ruling on Lessees' motion, the trial court treated it as a motion for summary judgment and granted the motion after a hearing. Although the record contains a stipulation to expand the record by including the transcript of that hearing, the transcript itself was never filed and is not part of the record before this court.

¶14 It is an appellant's responsibility to ensure the record contains all documents necessary to our consideration of the issues raised on appeal. *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16, 66 P.3d 70, 73 (App. 2003). When the record is incomplete, we presume the omitted evidence supports the trial court's decision. *Bliss v. Treece*, 134 Ariz. 516, 519, 658 P.2d 169, 172 (1983); *Am. Nat'l Fire Ins. Co. v. Esquire Labs of Arizona, Inc.*, 143 Ariz. 512, 522, 694 P.2d 800, 810 (App. 1984) ("[W]e must presume, in the absence of a complete record, that there was substantial evidence to support the facts found."); *Bee-Gee, Inc. v. Ariz. Dep't of Econ. Sec.*, 142 Ariz. 410, 414, 690 P.2d 129, 133 (App. 1984) (same). Accordingly, we need not address this claim further.

Disposition

¶15 The orders granting summary judgment in favor of Lessees and Landowners are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge